



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2005

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2005-01144

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 218418.

The Texas Department of Criminal Justice (the "department") received a request for information concerning a named employee, including any disciplinary investigations. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.122, 552.130, 552.134, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that some of the submitted information appears to have been obtained by the department's Office of the Inspector General pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. Gov't Code

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

§ 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary, and therefore not subject to the Act. Open Records Decision No. 411 (1984). Further, records kept by a district attorney who is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983). *But see* Open Records Decision No. 513 at 4 (1988) (defining limits of judiciary exclusion). Thus, to the extent that the information at issue was obtained pursuant to a grand jury subpoena and is held by the Office of the Inspector General as agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. To the extent the submitted information does not consist of records of the judiciary, we will address your exceptions to disclosure.

Next, we address the department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Additionally, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

The requestor asserts that she originally submitted the request for information to the department on September 27, 2004. The department states that "[o]ur belief is that we received the instant request on November 16, 2004 and that [the requestor] has made a good faith, honest mistake when she says that she sent us the instant request in September." We note that the request letter submitted by the department is dated November 16, 2004. *See* Gov't Code § 552.301(e)(1)(C). We also note that, although the requestor submitted to us a copy of the request she asserts was sent on September 27, there is no evidence to indicate that the department received it on this date. *See id.* Thus, whether the department actually received the request for information on September 27 is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Therefore, based on the department's representations, we conclude that the department received the request for

information on November 16, 2004, and thus was timely in submitting its request for a decision under section 552.301.²

The submitted information contains records that are subject to Chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. *See* Health & Safety Code § 611.004(a)(5) (professional may disclose confidential information to patient’s personal representative if patient is deceased).

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. The submitted information contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The submitted information also contains a W-4 form. Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C.

²We note that the department failed to timely assert section 552.136 of the Government Code. *See* Gov’t Code § 552.301(b)(1), (4). However, because this section is a mandatory exception, we will address your argument under it. *See* Gov’t Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302).

§ 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the department must withhold this form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we address the board's section 552.102 claim in conjunction with its common law privacy claim under sections 552.101 and 552.102 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy. *See* Open Records Decision No. 545 (1990). Likewise, an employee's designation of a retirement beneficiary is excepted from disclosure under the common law right to privacy. *See* Open Records Decision No. 600 (1992). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). We have marked the information that is confidential under common law privacy, and that the department must withhold under sections 552.101 and 552.102.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's

autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5; *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). After review of the remaining information, we find that it does not contain information that is confidential under constitutional privacy; therefore, the department may not withhold any of the remaining information under section 552.101 on that ground.

You assert that section 552.117 of the Government Code is applicable to some of the submitted information. Section 552.117(a)(3) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former department employees “regardless of whether the current or former employee complies with Section 552.1175.” We conclude that the department must withhold the information we have marked under section 552.117(a)(3).

You assert that the submitted test items are excepted under section 552.122. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee’s overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Having reviewed the submitted text questions, we conclude that questions one through six are “test items” as contemplated by section 552.122(b). Therefore, you may withhold these questions, and their recommended answers and responses, under section 552.122(b). However, we conclude that question number seven is not a test item for purposes of section 552.122(b); therefore, you may not withhold question seven and its recommended answers and responses under section 552.122.

You assert that some of the remaining information is excepted under section 552.130 of the Government Code, which provides in relevant part the following:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas motor vehicle record information we have marked under section 552.130.

You have marked information for which you raise section 552.134 of the Government Code. Section 552.134(a) relates to inmates of the department and provides in relevant part the following:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.134 is explicitly made subject to section 552.029. Section 552.029 states the following:

Notwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

. . .

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Gov't Code § 552.029(8). Under section 552.029, basic information regarding the use of force and alleged crimes involving an inmate is subject to required disclosure. Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. The documents you have marked contain information about an incident involving the use of force and an alleged crime involving inmates. Accordingly, the department must release the basic information regarding the crimes and use of force pursuant to section 552.029(8), but it must withhold the remaining information in these documents under section 552.134.³

³Because our ruling on this issue is dispositive, we do not address your remaining arguments regarding this information.

You assert that some of the remaining information is excepted under section 552.136 of the Government Code, which states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Based on your representations and our review of the information at issue, we conclude that the department must withhold the information we have marked pursuant to section 552.136 of the Government Code.

To conclude, any information consisting of records of the judiciary is not subject to disclosure under the Act. The department may only release the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Pursuant to section 552.101 of the Government Code, the department must withhold (1) the I-9 form under 1324a of Title 8 of the United States Code, (2) the W-4 form under section 6103(a) of Title 26 of the United States Code, and (3) the information that is confidential under common law privacy. The department must also withhold (1) the information we have marked under section 552.117, (2) the marked Texas motor vehicle record information under section 552.130, and (3) the marked account number under section 552.136. The department may withhold interview questions one through six, and their recommended answers and responses, under section 552.122. The department must release the basic information regarding the crimes and use of force that pertain to prisoners, but it must withhold the remaining information that it has marked to be withheld under section 552.134. The department must release the remaining information at issue.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

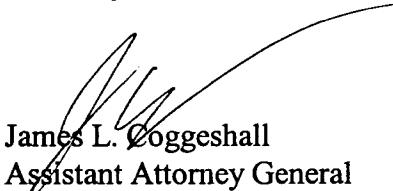
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 218418

Enc. Submitted documents

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